MEMORANDUM

TO: Chairman William A. Mundell
Commissioner Jim Irvin
Commissioner Marc Spitzer

FROM: Tim Sabo
Attorney, Legal Division

THRU: Christopher C. Kempley
Chief Counsel

DATE: December 10, 2001

RE: Commission Jurisdiction over wireless slamming and cramming
Docket RT-00000J-99-0034

I. Summary

The Commission's proposed slamming rules, A.A.C. R14-2-1901 *et seq.*, apply to wireless carriers only when federal law requires wireless carriers to provide equal access. See Proposed A.A.C. R14-2-1903. However, the Commission's proposed cramming rules, A.A.C. R14-2-2001 *et seq*,. are fully applicable to wireless carriers. See Proposed A.A.C. R14-2-2003. On November 20, 2001, Verizon Wireless filed a letter in this docket restating its claim that the Commission does not have jurisdiction to apply the proposed slamming and cramming rules to wireless carriers. Verizon asserts that the Commission does not have jurisdiction because Arizona's slamming and cramming statute, A.R.S. § 44-1571 *et seq.*, does not apply to wireless carriers. The Commission should reject this interpretation of Arizona's slamming and cramming statute because (1) the statute does not prohibit the Commission from applying slamming and cramming rules to wireless carriers, and the Commission already has the power to apply slamming and cramming rules to wireless carriers under the Commission's existing powers under

Title 40; (2) the statute should not be read as an implied repeal of the Commission's existing powers under Title 40; and (3) if the statute is read in the manner suggested by Verizon Wireless, it would raise a substantial question about the constitutionality of the statute, and statutes should be read to avoid constitutional problems. This memorandum will also address the scope of federal preemption of the Commission's jurisdiction over wireless carriers.

II. Federal law does not preempt Commission jurisdiction over wireless slamming and cramming.

Federal law provides that states are preempted from regulating wireless rates or market entry. 47 U.S.C. § 332 (c)(3). In areas that are not rates or market entry, states remain free to regulate wireless carriers. See Cellular Telecommunications Industry Assoc. v. Federal Communications Comm'n, 168 F.3d 1332, 1336 (D.C. Cir. 1999). Indeed, consumer protection is one of the areas that Congress expressly did not want to preempt. Id. Because consumer protection measures, including slamming and cramming rules, are not rates or market entry, the Commission's authority over slamming and cramming is not preempted.

III. The canons of statutory construction suggest that the Commission should reject the interpretation suggested by Verizon Wireless.

A. Arizona's slamming and cramming statute does not prohibit the Commission from applying slamming and cramming rules against wireless carriers.

Arizona's slamming and cramming statute does not apply to wireless carriers. A.R.S. § 44-1571(3), (4). However, this statute does not prohibit the Commission from applying slamming and cramming rules to wireless carriers. As Verizon Wireless points out, the provisions in Title 44 do not contain a grant of authority to the Commission over

wireless slamming and cramming. Wireless carriers provide "public… telephone service" and are thus public service corporations. Ariz. Const. art. XV § 2. Therefore, the Commission already had the power to enact slamming and cramming rules before the legislature added the new provisions to Title 44. See A.R.S. §§ 40-202 (power to "supervise and regulate every public service corporation"); 40-203 (power to prohibit unjust "practices or contracts"); 40-321 (service quality); 40-322 (power to determine and require just and reasonable service). Because the Commission already had the power to apply slamming and cramming rules against public service corporations, including wireless carriers, the Commission did not need additional authorization in Title 44; and because Title 44 does not contain a prohibition, the Commission is free to require wireless carriers to follow the proposed slamming and cramming rules.

B. Arizona's slamming and cramming statute should not be read as an implied repeal of the Commission's existing authority.

As already noted, Arizona's slamming and cramming statute does not apply to wireless carriers, but the Commission has the power to enact the proposed rules under its Title 40 authority. The law strongly disfavors construing a statute as repealing an earlier one by implication; rather, whenever possible, the Arizona courts interpret two apparently conflicting statutes in a way that harmonizes them and gives rational meaning to both. See State v. Tarango, 185 Ariz. 208, 210; 914 P.2d 1300, 1302 (1996); Walters v. Maricopa County, 195 Ariz. 476, 481; 990 P. 2d 677, 682 (App. 1999). An implied repeal will only be found if the language of the newer statute clearly shows that the legislature intended the newer statute to override the older statute. Curtis v. Morris, 184 Ariz. 393, 397; 909 P.2d 460, 464 (App. 1995) decision approved 186 Ariz. 534, 535, 925 P.2d 259 (1996). There is nothing in the language of Arizona's slamming and

cramming statute indicating legislative intent to repeal the Commission's authority over public service corporations, including wireless carriers. Instead, Arizona's slamming and cramming statute should be read as a prompt for the Commission to act under its existing authority. In this way, the statutes can be read so that they harmonize with each other. Because the statutes can be read consistently, the Commission should reject a reading of Arizona's slamming and cramming statute that would amount to an implied repeal of the Commission's authority under Title 40.

Moreover, the legislature intended to protect consumers from unjust practices in telecommunications services. Statutes should be "liberally construed to effect their objects and to promote justice." A.R.S. § 1-211.B. Because applying the proposed slamming and cramming rules to wireless furthers the goal of the statue, the Commission should not adopt a reading of the statute that thwarts the ultimate goal of the statute, protection of consumers.

C. Interpreting Arizona's slamming and cramming statute in the manner suggested by Verizon Wireless would raise a substantial Constitutional question, and the Commission should therefore avoid such a construction.

The Arizona Supreme Court has found that the Commission's powers under Article 15 § 3 are limited to ratemaking. Corp. Comm'n v. Pacific Greyhound Lines, 54 Ariz. 159, 94 P.2d 443 (1939). However, the Arizona Constitution vests in the Commission the power to "make and enforce reasonable rules, regulations, and orders for the convenience [and] comfort" of the customers of public service corporations. Ariz. Const. Art. 15 § 3. Recognizing the tension between this language and Pacific Greyhound, the Arizona Supreme Court has noted that Pacific Greyhound "undercut the framers' vision of the Commission's role as set forth in the text of the constitution, as

described by the framers, and in earlier case law." Arizona Corp. Comm'n v. State ex rel. Woods, 171 Ariz. 286, 293, 830 P.2d 807, 814 (1992). This language calls into doubt Pacific Greyhound and indicates that there are still substantial unresolved questions regarding the scope of the Commission's § 3 authority. Legislation should be read, if at all possible, in a way that is consistent with the constitution. Arizona Corp. Comm'n v. Superior Court, 105 Ariz. 56, 62, 459 P. 2d 489, 495 (1969); Stillman v. Marston, 107 Ariz. 208, 209, 484 P.2d 628 (1971). Because reading Arizona's slamming and cramming statute as a prohibition on Commission regulation of wireless carriers would raise a significant question of whether the statute, so construed, conflicts with § 3, the Commission should not read the statute as a prohibition.